

THOMAS CREEK LUMBER & LOG CO.,)	AGBCA No. 2005-132-1
)	
Appellant)	
)	
Representing the Appellant:)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

April 4, 2006

Before POLLACK, VERGILIO, and STEEL¹, Administrative Judges.

Opinion for the Board by Administrative Judge VERGILIO.

On February 14, 2005, the Board received this appeal from Thomas Creek Lumber & Log Co. of Stayton, Oregon (purchaser). The purchaser had constructed a road under the Tarzan Timber Sale contract, No. 079549, with the U. S. Department of Agriculture, Forest Service (Government). In a claim letter, dated December 30, 2004, to the contracting officer, the purchaser sought to receive credit of \$45,000 for what it characterized as uncompensated road construction expenses arising from additional and changed conditions and requirements. The contracting officer determined that a Final Acceptance Report was signed and issued on August 18, 2004, by the Government. The contracting officer referenced a contract provision, clause BT9.21, Submission of Claim ("When Purchaser constructs Specified Road, Purchaser must file any Claim not later than 60 days after

¹ Administrative Judge Steel, of the Department of Interior Board of Contract Appeals, sits by designation of the Secretary of the Department of Agriculture.

receipt of Forest Service written notification authorizing use of road”; “Failure by Purchaser to submit a Claim within established time limits shall relinquish the United States from any and all obligations whatsoever arising under said contract or portions thereof”). Although he focused upon when the written notice of road acceptance was issued, not received, the contracting officer found that the claim was “submitted well past the timeline specified.” He denied the claim. The purchaser here appeals that determination.

The Board has jurisdiction over this timely-filed matter pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended (CDA). In Portland, Oregon, on Friday, August 26, 2005, a hearing on the merits was held to determine the correctness or not of the contracting officer’s determination that the purchaser’s right to relief had lapsed (the issues of entitlement and quantum on the specifics of the claim are not now to be resolved by the Board). The appeal file (as supplemented) and hearing transcript constitute the evidentiary record. Each party has submitted a pre-hearing and a post-hearing brief. The final brief is dated January 24, 2006.

This appeal requires the Board to determine if the purchaser timely submitted a claim for credit for road construction. The contract specifies, regarding road construction matters, that the purchaser must submit a written claim to the contracting officer no later than 60 days after receipt of the Government’s written notice of acceptance of the road. It is undisputed that the purchaser received such written notification. The record demonstrates that the purchaser received the notification on August 25, 2004, clearly before the end of October 2004. The purchaser’s written claim, dated December 30, 2004, was submitted to the contracting officer outside of the permissible period of time. Under the contract, at the time of submitting the claim, the purchaser lacked any basis to claim the entitlement to relief for its road construction efforts.

The purchaser now contends that a letter dated February 11, 2004, was a claim. The letter, addressed to the engineering representative (other than the contracting officer), in the course of negotiating a change order, did not request a contracting officer decision. Moreover, neither the purchaser nor the engineering representative, to whom the submission was made, treated the submission as a request for a contracting officer’s decision. The submission is not a claim under the contract.

Having failed to submit a timely claim, the purchaser’s entitlement to relief under the contract expired regarding the road construction work. Accordingly, the Board denies the claim.

FINDINGS OF FACT

1. With an award date of March 27, 2003, the purchaser and Government entered into a timber sale contract, under which the purchaser was required to construct a specified road (Appeal File, Exhibit 2 at 1, 6) (all exhibits are in the appeal file). The contract states that the construction of the

road is complete when “Purchaser constructs Specified Roads and Forest Service furnishes Purchaser with written notice of acceptance under BT6.36”² (Exhibit 2 at 146).

2. The Disputes clause of the contract states that:

“Claim” means a written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract. A voucher, invoice, or request for payment that is not in dispute when submitted is not a Claim for the purposes of the Contract Disputes Act of 1978. However, where such submission is subsequently not acted upon in a reasonable time, or disputed either as to liability or amount, it may be converted to a Claim. A Claim by Purchaser shall be made in writing and submitted to Contracting Officer for decision.

(Exhibit 2 at 138 (¶ BT9.2).)

3. The contract contains explicit direction in a paragraph captioned “Submission of Claim”:

Purchaser Claims under this contract shall be submitted in writing to Contracting Officer. Date of receipt by Contracting Officer shall be considered as the beginning date for determining any interest due on Claims.

Failure by Purchaser to submit a Claim within established time limits shall relinquish the United States from any and all obligations whatsoever arising under said contract or portions thereof. Purchaser shall file such Claim within the following time limits:

² BT6.36, Acceptance of Work, states, in pertinent part:

Upon Purchaser’s written request and assurance that work has been completed, Forest Service shall perform an inspection promptly so as not to delay unnecessarily the progress of Purchaser’s Operations. Such a request may be for acceptance of:

- (a) Any reasonable portion of Specified Road listed in AT10,

....

Within 5 days of said inspection, Forest Service shall furnish Purchaser with written notice either of acceptance or of work remaining to be done.

(Exhibit 2 at 130.)

(a) When Purchaser constructs Specified Road, Purchaser must file any Claim not later than 60 days after receipt of Forest Service written notification of acceptance.

(b) When Forest Service constructs Specified Road, Purchaser must file any Claim not later than 60 days after receipt of Forest Service written notification authorizing use of road.

(c) For Payment Units, Purchaser must file any Claim not later than 60 days after receipt of Forest Service written notification that Payment Unit has been accepted.

(d) In all other cases, Purchaser must file any Claim not later than 60 days after receipt of Contracting Officer written notification that timber sale is closed.

(Exhibit 2 at 139 (¶ BT9.21)).

4. In the course of performance, the parties engaged in negotiations regarding design changes and associated price changes involving the road construction (Exhibit 9 at 546-48; Transcript at 18-19, 21, 32, e.g.). In December 2003, the parties took measurements related to the road construction. The parties met on January 27, 2004. During the meeting the Government provided the purchaser with a draft change order. The draft (which lacks signatures) indicates an issuance date of January 27, 2004, and would have increased the purchaser's credit by \$9,974.24. During the meeting, the parties discussed the scope of the changes and the appropriate measurements of and payment for the redesigned construction. (Exhibit 9 at 546-52, 565; Exhibit 15; Transcript at 22-23.) Notes taken by a Government employee attending the meeting indicate various topics discussed and differences of opinion between the subcontractor (which performed the road construction work) and the Government. The notes conclude with the statement: "They will take doc[ument]s back & digest." (Exhibit 9 at 546-47.)

5. A two-page document dated February 11, 2004, from the purchaser is addressed to the Government's engineering representative (not the contracting officer), with a stated subject of Tarzan Reconstruction, Change Order (Draft). The purchaser sent this to the engineering representative in response to the draft change order received from the Government and to the meeting of the parties in January. (Transcript at 21-22.) The document identifies seven line items of quantity, unit price, and price changes, with a net change of \$35,282.76, in credit for the purchaser. Following the itemization and proposed net changes, the purchaser addresses a note to the engineering representative, stating in full:

These are costs incurred by [the subcontractor and purchaser] associated with the Tarzan Timber Sale reconstruction[. Please let me know if these changes are acceptable as time is of the essence and many parties are waiting & this has taken long enough.

(Exhibit 7 at 2-3.) When the purchaser's president submitted the letter of February 11, he expected that the Government would accept the proposed quantities and pricing for the change order. He did not know that the Government would not fully accept some of the various proposed changes at that time of the submission. (Transcript at 58-59.) He provided no testimony that indicated that he treated, or intended that the engineering representative treat, the submission as a claim in February; at best, at the time of the hearing he would characterize the document as a "kind of, claim request to -- for payment, for those items." (Transcript at 56). After February, on-going discussions occurred. In some of those discussions with the contracting officer, the purchaser's president indicated that he might be filing (future, not past tense) a claim. (Transcript at 32, 53-54.) The purchaser's president made no inquiry regarding the status of the submission, which was made in the context of negotiating an agreement regarding design changes.

6. Viewing the submission as an element in negotiating the change order pricing, the engineering representative utilized the submission in revising units and prices in the draft change proposal. He did not treat the submission as a claim; instead, after making various annotations on the document, he placed the submission in his own contract folder, and did not forward the document to the contracting officer. (Transcript at 76-77, 101-02; Exhibit 9 at 568-69.) The contracting officer first saw the submission dated February 11 in January 2005, when assembling the appeal file in this matter (Transcript at 112).

7. The Government made adjustments in its proposed change order regarding road construction. By facsimile sent on April 19, 2004, the Government provided the purchaser with a revised draft change order, which proposes a price credit increase of \$17,247.28. On April 20, 2004, the purchaser provided the subcontractor with the revised draft change order. The purchaser requested that the subcontractor review the draft and make changes or adjustments before calling the purchaser. (Exhibit 8 at 104-11; Transcript 80-81).

8. Under a letter dated May 11, 2004, the contracting officer provided the purchaser with a revised contract change order, a construction cost adjustment for the specified road. The letter states, in pertinent part:

Enclosed is the revised design change form for your consideration. I believe it to be a fair and even generous assessment of the work required to date. I hope you will find it at least workable for you. Unless some mathematical error is indicated, this will be the Forest Service's final offer.

If you are in agreement, please sign and return the form to me. I will return a fully executed copy for your records. If you are still not in agreement or if I do not receive the form from you by May 31, 2004, I will reissue the form as an Ordered Design Change.

In either case, your statement of account will be credited with the amount indicated upon completion of the reconstruction and final acceptance of the road.

You indicated you might file a claim regarding the roadwork. The contract certainly gives you the right to do so, however I see no basis for granting an award in this case.

(Exhibit 1 at 21.) The contracting officer included the final-quoted paragraph in this correspondence given earlier conversations he had with the purchaser (Finding of Fact (FF) 5); however, the purchaser never indicated to the contracting officer that it had submitted a claim prior to a submission of December 2004 (FF 18) (Transcript at 54-55, 117-18).

9. The contracting officer received no response from the purchaser regarding the letter of May 11. The purchaser made no inquiry or written submission in response to this letter; that is, prior to allegations raised in these proceedings, the purchaser never indicated to the Government (the contracting officer or other individual), that the purchaser intended that the February 11 submission be treated as a claim. (Transcript at 54-55, 118.)

10. A letter, dated June 21, 2004, from the contracting officer to the purchaser, encloses an "ordered design change" (i.e., unilateral change order 1) and includes the statement, "I will credit your account in the amount of \$17,247.28 upon final acceptance of the road." (Exhibit 1 at 17). The purchaser did not sign this change order 1. (Exhibit 1 at 18). This unilateral change order, issued without a concurring signature of the purchaser, is consistent with the statements by the Government in the letter dated May 11, 2004 (FF 8).

11. Although the purchaser disagreed with the modification (Transcript at 25), the purchaser did not reduce to writing its disagreement with the modification or seek a contracting officer decision on the credit to which it alleges it is entitled until the letter dated December 30, 2004 (Transcript at 54-55).

Final inspection and road acceptance

12. By letter dated August 16, 2004, the purchaser requested that the Government conduct a final inspection on the road construction portion of the timber sale (Exhibit 3 at 1). On August 18, 2004, the Government performed a final inspection of the road construction; it concluded that all work was 100% completed, and completed to the terms of the contract. The Government's engineering representative noted these details in the daily diary for this date. (Exhibit 3 at 3.)

13. The final acceptance report is dated August 18, 2004. The report states that it constitutes final acceptance of the road in question. The recommendation by the designated engineer bears his signature and a date of August 18, 2004; the contracting officer signed the report, indicating his approval. (Exhibit 4 at 1.) On August 18, the contracting officer placed the acceptance report, the contract daily diary for that date, and a draft of change order 2 (with justification) in the mail room to be mailed to the purchaser. With the final acceptance, the purchaser could utilize the road for movement of timber and could utilize any additional purchaser credit. The purchaser did so utilize the road. The purchaser made no inquiry as to the status of acceptance, although the contracting

officer would have expected such a communication had the purchaser not received the final acceptance report. (Transcript at 120-26.)

14. The purchaser received a copy of the final acceptance. The final acceptance report is in the purchaser's files stapled to the draft of change order 2 (with justification) and the daily diary of August 18, 2004; that is, four pages are stapled together. The final acceptance report itself is not date stamped by the purchaser; there is no specific documentation indicating a date of receipt of the report (the Government did not send the notice return receipt). However, one of the four pages, (the draft of change order 2) bears the purchaser's date stamp of August 25, 2004. (Exhibit 8 at 58-61.)

15. By its placement in the purchaser's files, the purchaser received the document prior to October 15, 2004, the date of the preceding document in its records that were kept chronologically (newest to oldest). The record does not support a conclusion that the purchaser received written notification of road acceptance after October 15, 2004. The purchaser's president does not know when the final acceptance report was received; he lacks a basis to conclude that the document was received after October 15, 2004, although he conjectures (without support) that the documents were not received together, and the files may have been kept inadequately by others. (Transcript at 5, 27-30, 48-49.)

16. Based upon the record and factual findings above, the Board concludes that on August 25, 2004, the purchaser received the Government's written notice of acceptance of the road; the purchaser received the notice prior to October 31, 2004.

17. With a signature date by the purchaser of September 2, 2004, and by the contracting officer of September 7, 2004, the parties entered into change number 2, which increases the purchaser credit to account for extra material needed under the contract and compensated as an actual quantity under a contract line item. This change order (effective after the Government's acceptance of the road) identifies a total dollar credit for the purchaser for the road construction efforts. (Exhibit 1 at 19.)

Claim and subsequent matters

18. By letter dated December 30, 2004, the purchaser submitted to the contracting officer what it characterizes as a claim seeking to recover \$45,000 said to be incurred "as a result of [the Government's] failure to properly compensate purchaser for additional and changed road reconstruction as required by this contract." The purchaser specifies, in full:

Thomas Creek Lumber & Log Co. wishes to file a claim on the Tarzan timber sale, contract # 079549 as a result of failure to properly compensate purchaser for additional and changed road reconstruction as required by this contract. The action by the Forest Service was arbitrary, capricious and negligent and clearly in violation of the contract. The Forest Service has acknowledged and admitted that additional work was required and all phases of reconstruction has been completed and accepted, but has failed to compensate Thomas Creek for the extra costs Thomas Creek

incurred as a result of changes in conditions and requirements under this contract. Thomas Creek submits this claim for \$45,000 and is made in good faith and that the supporting data is accurate and complete to the best of the Purchaser[']s knowledge and belief, and the amount requested accurately reflects the contract adjustment for which the Purchaser believes the Government is liable.

Thomas Creek requests an immediate Contracting Officer decision on this claim.

(Exhibit 5 at 1.) How the purchaser arrived at the \$45,000 figure is not clear from the submission.

19. By letter dated January 24, 2005, the contracting officer issued the decision on the claim. The decision specifies that contract provision BT9.21, Submission of Claim, requires all road construction claims to be filed within 60 days of final acceptance of road work. With the final acceptance report "signed and issued on August 18, 2004," the "sixtieth day in this instance occurred on October 17, 2004." The contracting officer denies the claim, concluding that the claim, received by the contracting officer on January 6, 2005, was submitted well past the time period permitted in the clause. (Exhibit 6.)

20. On February 14, 2005, the Board received this appeal from the purchaser contesting the determination of the contracting officer denying the claim. The purchaser maintains that it is entitled to credit at the contract rates for actual quantities utilized in the road construction.

DISCUSSION

By the arguments raised in its post-hearing brief, the purchaser pursues relief based upon the assertion that "information it submitted in January and February of 2004 was a claim." Alternatively, it maintains that "once there was a unilateral change order that became part of the contract, the time to file a claim was extended, and the December 30, 2004 letter that was sent by the Appellant \ Purchaser was timely." (Purchaser Post-hearing Brief at 1.) The Government views the December 30, 2004, as the only claim potentially submitted under the contract; however, the submission was made after the period for such a claim had expired. Under the contract, observes the Government, the purchaser has no basis for relief.

Submission of February 11, 2004

The purchaser maintains that the submission dated February 11, 2004, addressed to the engineering representative (FF 5) constitutes a claim. The purchaser relies upon the Federal Acquisition Regulation (FAR) definition of claim, as it asserts that the language is substantially similar to that in the contract. The purchaser has not demonstrated that the FAR applies. "The FAR applies to all acquisitions as defined in part 2 of the FAR, except where expressly excluded." (48 CFR 1.104 (2003).) Part 2 defines "acquisition": "*Acquisition* means the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease" (48 CFR 2.201 (2003).) The record does not

demonstrate that appropriated funds were utilized for the road construction; rather, the purchaser earned credit from the construction efforts obtained under a contract through which the Government sold (not acquired) timber. The contract contains clauses which define and address the submission of a claim (FF 2, 3). In resolving this appeal, the Board will utilize the term and conditions agreed upon in the contract.

The contract specifies that a claim shall be submitted to the contracting officer in writing (FF 2, 3). The submission dated February 11 is not addressed to the contracting officer and includes no direction that the submission be forwarded to the contracting officer for a decision (FF 5). The recipient (the engineering representative) did not forward the submission to the contracting officer. The subsequent dealings between purchaser's president and the contracting officer further demonstrate that the purchaser did not view the submission as a claim, as references were to a potential claim to be submitted in the future, not a request for a decision on an already submitted claim; that is, there was no expressed intent for the contracting officer to issue a decision. (FF 5-6, 8-11.) The Board concludes that the submission dated February 11, 2004, is not a claim under the contract. D.L. Braughler Co. v. West, 127 F.3d 1476, 1481-82 (Fed. Cir. 1997) ("Although Braughler's February 10, 1988 letter was sent to an authorized representative of the contracting officer, the letter gave no indication that Braughler was seeking a final decision from the contracting officer, and the letter was not forwarded to the contracting officer. Moreover, Braughler sought to resolve the matter with the resident engineer [the recipient of the letter]. Under these circumstances, the February 10, 1988 letter did not qualify as a claim 'submitted to the contracting officer for a decision' under [41 U.S.C.] section 605(a)." (footnote omitted).)

In its post-hearing brief, the purchaser asserts: "It is clear from [the contracting officer's] letter, dated May 11, 2004, that Thomas Creek appropriately addressed its claim to [the contracting officer's representative] per prior arrangements, and that the claim was in fact submitted to [the contracting officer] for review." (Purchaser Post-hearing Brief at 6.) This statement lacks support in the record. There is no indication that there existed an arrangement for the purchaser to submit a claim to the engineering representative without any indication that the submission was to be provided to the contracting officer for a decision. The submission itself does not indicate that it is a claim. It provides no direction to have the contracting officer issue a decision regarding the submission. Further, the contracting officer did not receive the submission for review. (FF 6.) The language of the May 11 letter from the contracting officer (FF 8), compels the Board to reach a conclusion contrary to that of the purchaser. The contracting officer noted that the purchaser may be submitting a claim, not that the purchaser had submitted a claim. The purchaser did nothing to disabuse the contracting officer of his position that a claim had not been submitted. Subsequent actions and inactions by the purchaser (particularly the submission dated December 30, 2004, that states that it is a claim, without a reference to any earlier-submitted claim), serve to confirm that a claim was not provided for a contracting officer decision until the letter dated December 30, 2004. Thus, neither the letter of May 11 (FF 8) nor the unilateral change order of June 2004 (FF 10) may be deemed a contracting officer decision relating to a purchaser claim.

Unilateral change order

The purchaser contends that its refusal to sign the draft change order that was then issued as a unilateral change order (FF 8-10), put the contracting officer on notice that the purchaser had filed a claim. The failure to sign a document does not meet the test for a claim to be in writing. Moreover, a disagreement with a proposed or unilateral change order does not indicate that a claim has been or will be filed. Although the lack of signature may indicate the purchaser's non-acceptance of an imposed price adjustment, such disagreement does not constitute a written claim for relief or put the contracting officer on notice that the purchaser intends to pursue a claim. A claim does not result from every contractor-Government dispute. The contract imposes explicit requirements upon the contractor to bring a claim before the contracting officer. Actions of the purchaser prior to its letter dated December 30, 2004, do not satisfy the requirements of a claim.

Receipt of road acceptance

Based upon the record, and as detailed above, the Board finds that the purchaser received the written notification of road acceptance on August 25, 2004, prior to October 31, 2004 (60 days hence being December 30, 2004) (FF 16).

Submission of December 30, 2004

By submission dated December 30, 2004, the purchaser sought from the contracting officer a decision on what the purchaser identifies as a claim. The claim seeks additional credit "for additional and changed road reconstruction." The purchaser raises no basis for adjustment other than that relating to the specified road. (FF 18.) The purchaser seeks credit at the contract rates for what it alleges are actual quantities used in the road construction (Purchaser's Post-hearing Brief at 8).

The contract mandates terms and conditions for the submission of claim, including the following. "Purchaser shall file such Claim within the following time limits: (a) When Purchaser constructs Specified Road, Purchaser must file any Claim not later than 60 days after receipt of Forest Service written notification of acceptance." (FF 3.) The purchaser received the written notification on August 25, 2004.

The purchaser alleges that the issuance of the unilateral change order somehow transforms this claim to clause (d) ("in all other cases"), with receipt of the written notification that the timber sale is closed being the critical date for submission of a claim. The purchaser explains its position in a single paragraph:

Purchaser also is entitled to a finding that its letter of December 30, 2004, was timely because it was submitted within 60 days of the termination [i.e., completion] of the contract. Once the unilateral change order was issued, it became part of the contract. It did not matter that the change order initially related to a Specified Road.

Once it was part of the contract, Purchaser had the right to file his claim under BT9.21(d).

(Purchaser Post-hearing Brief at 8 (references to record omitted).)

Under the clause, the issuance of a change order is not a factor in calculating the period within which to submit a claim. The purchaser's claim relates solely to road construction, and, therefore, falls fully within clause (a).

The purchaser submitted the claim after the period to do so had expired. The contract details the consequences: "Failure by the Purchaser to submit a Claim within established time limits shall relinquish the United States from any and all obligations whatsoever arising under said contract or portions thereof." (FF 3.)

The purchaser offers no reason to depart from the explicit language of the contract, and the time requirements for submitting a claim. The failure to timely submit the claim means that the purchaser can no longer claim entitlement under the contract. Buse Timber & Sales, Inc., AGBCA Nos. 90-168-1 et al., 94-1 BCA ¶ 26,456 (regarding the parallel C9.21, Submission of Claims clause (claim to be filed within 60 days of receipt of written notice that sale is closed), this Board stated: "Such restrictions are valid and have been enforced by this Board and the U.S. Court of Appeals for the Federal Circuit" (citations omitted); Board concluded that the submission, made more than 60 days after receipt of written notice, was untimely). This holding is consistent with a prior court decision:

The consequences of failing to comply with the time limitation provision are explicit in the contract language:

Failure by Purchaser to submit a claim within these time limits shall relinquish the United States from any and all obligations whatsoever arising under said contract

Provision C9.21.

It is clear to the court that a person of reasonable intelligence, when faced with the contractual language at issue here, would conclude that a failure to file a claim within the 60-day period would preclude the recovery of any refunds under that claim. . . . [T]he provision is not ambiguous and therefore may properly be enforced to effect the forfeiture of an untimely claim.

Stone Forest Industries, Inc. v. United States, 26 Cl. Ct. 410, 414 (1992). Also supportive is the rationale and holding of another board, applied in parallel circumstances :

The boards have recognized that a late filing could invalidate a claim, however, if "such result is clearly mandated by the clause." Interlog Corp., ASBCA 21212, 77-1

BCA ¶ 12,362, at 59,836. In the instant cases, we are confronted with this sort of clear contract clause. The clause permits the contractor to receive increased rental payments, commensurate with increases in real estate tax charges, but only if the firm “submit[s] copies of paid tax receipts within 60 days from when taxes are due and payable. If the contractor does not make each submittal within the specified period, its inaction “will constitute a waiver by the lessor of his rights to a tax adjustment for the specific year in which the rental adjustment would otherwise apply.” The right to increased payments is thus circumscribed by the very clause which creates it.

Universal Development Corp., GSBCA Nos. 12138(11520), et al., 93-3 BCA ¶ 26,100, at 129,739. The purchaser submitted the claim to the contracting officer after the period permitted under the contract, thereby foregoing entitlement to relief. With an untimely claim, relief is not available to the purchaser. The Board denies this appeal.

DECISION

The Board denies this appeal.

JOSEPH A. VERGILIO

Administrative Judge

Concurring:

HOWARD A. POLLACK

Administrative Judge

CANDIDA S. STEEL

Administrative Judge

Issued at Washington, D.C.

April 4, 2006